PUBLIC PROSECUTOR

v.

LING SING KWONG & ANOR.

HIGH COURT BORNEO, SIBU
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. 11 OF 1989]
10 OCTOBER 1990

CRIMINAL PROCEDURE: *Possession of uncustomed goods - Application by defendant for release of vehicle in which goods were found - Stay of release order - Power to release goods - Whether administrative discretion - Whether jurisdiction of Court excluded - Expressly or impliedly - Property in the custody of police - Criminal Procedure Code, s. 407(ii) - Customs Act 1967, ss. 115, 135(1)(D).*

The 1st accused and another were charged under s. 138(1)(d) of the Customs Act 1967 (the Act) that whilst in a motor vehicle they were in possession of uncustomed goods, 83 cartons of cigarettes on which customs duty leviable by law amounting to RM2,307.40 had not been proved to have been paid. After the accused pleaded not guilty to the charge, Counsel for the defence applied for the release of the motor vehicle to the 1st accused. The prosecution objected. After hearing arguments, the learned trial Magistrate allowed the application for the release on certain conditions. Upon application by the prosecution, however, the order for release was stayed.

The 2 grounds of appeal were that:

(i) The learned Magistrate had failed to consider adequately or at all the specific provisions of s. 115 of the Act.

(ii) The learned Magistrate failed to appreciate that under s. 115 of the Act, the power to release any moveable property seized is an administrative discretion.

It is important to note that in the instant case under appeal the learned Magistrate did not question any of the powers under the said s. 115. Nor did he purport to make the order that he made under the said s. 115.

It appears that the Magistrate placed reliance on s. 407(ii) Criminal Procedure Code (CPC).

The issue before the Court was whether s. 115 of the Act excluded the application of s. 407 of the CPC.

Held:

[1] Where in a proceeding before the Court an issue arises which the Court has express jurisdiction to deal, that jurisdiction can only be ousted by plain and clearest words; in this case there is no word of exclusion either expressly or impliedly.

[2] Section 115(6) of the Act excludes jurisdiction of the Court respecting actions relating to Acts done or decisions taken by or on behalf of senior officers of customs under s. 115 but does not oust the jurisdiction of the Court conferred by s. 407 of the CPC.

[3] The scope under the said s. 407(ii) is wider in that it covers property in the custody of the police.

[4] The *dictum* in *Soon Chee Kong's* case that the power to order the release of goods liable to forfeiture laid only in the executive, rested on the customs law which was in force then; these provisions are no longer the law and are different from the comparative corresponding sections of the present Customs Act.

[Appeal dismissed; order of stay revoked.]

Cases referred to:
Soon Chee Kong v. PP [1951] 17 MLJ 86
Goldsack v. Shore [1950] 1 All ER 276

Legislation referred to:
Criminal Procedure Code, ss. 316, 407, (ii)
Customs Act 1967, ss. 115, (6), 127, 135(1)(d)
Customs Enactment 1936, ss. 106, 108

For the appellant - Nik Suhaimi bin Nik Sulaiman, Deputy Public Prosecutor
For the 1st respondent - George Lau appearing for Chen Tai Huong; M/s. Chen & Co.

JUDGMENT

Chong Siew Fai J:

This is an appeal by the prosecution against the decision of the learned trial Magistrate at Sarikei releasing the motor vehicle No. KJ 1409 to the 1st accused subject to certain conditions which are unnecessary to be set out for our purpose.

The facts are simple. The 1st accused and another were charged that while in the said motor vehicle they were knowingly in possession of uncustomed goods, to wit, 83 cartons of cigarettes on which customs duty leviable by law amounting to RM2,307.40 had not been proved to have been paid, an offence under s. 135(1)(d) of the Customs Act 1967. After the accused pleaded not guilty to the charge, Counsel for the defence applied for the release of the motor vehicle to the 1st accused. The prosecution objected. After hearing arguments, the learned trial Magistrate allowed the application for the release on conditions. Upon application by the prosecution, however, the order for release was stayed.

There were 2 grounds of appeal and they read:

(i) The learned Magistrate failed to consider adequately or at all the specific provisions of s. 115 of the Customs Act 1967.

(ii) The learned Magistrate failed to appreciate that under s. 115 of the Customs Act 1967, the power to release any moveable property seized is an administrative discretion.

For the appellant, it was contended that the Court had no power to release any property liable to seizure and therefore liable to forfeiture because such power was, by virtue of s. 115 of the Customs Act 1967, with the executive. *Soon Chee Kong v. PP* [1951] 17 MLJ 86 was cited in support.

It is important to note that in the instant case under appeal the learned Magistrate did not question any of the powers under the said s. 115. Nor did he purport to make the order that he made under the said s. 115.

Although no provision of any law was specifically mentioned in the record of proceedings of the lower Court, it appears the reliance was placed on s. 407(ii) of the Criminal Procedure Code. (FMS Cap. 6).

So far as is relevant to the instant case, the said s. 407(i) provides:

> During or at the conclusion of any inquiry or trial in any criminal Court the Court may make such order as it thinks fit for the custody or disposal of any property ... produced before it or in its custody or the custody of the police ... regarding which any offence appears to have been committed or which has been used for the commission of any offence.
>
> The power herein conferred upon the Court shall include the power to make an order ... for the delivery to any person of such property, but shall be exercised subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had.

The relevant part of s. 407(iv) reads:

> A Court making an order under this section in respect of any property ... shall direct whether such order is to take effect immediately ... and shall include in such order all necessary directions and conditions to ensure that such property ... will be produced as and when required for the purposes of the inquiry or trial

Does s. 115 of the Customs Act 1967 exclude the application of s. 407 of the Criminal Procedure Code? I do not think so. While s. 115 of the 1967 Act gives discretionary powers to senior officers of customs, s. 407 of the Code confers powers on the Courts. Where, in a proceeding before the Court, an issue arises which the Court has express jurisdiction to deal, that jurisdiction can only be ousted by plain and clearest words. In this case there is no word of exclusion, express or by implication. Section 115(6) of the Customs Act 1967 excludes jurisdiction of the Court respecting, *inter alia*, actions relating to acts done or decisions taken by or on behalf of senior officers of customs under s. 115 but does not, in my opinion, oust the jurisdiction of the Court conferred by s. 407 of the Criminal Procedure Code.

Dealing with s. 115 of the Customs Act 1967 in Criminal Revision Nos. 12 and 13 of 1973 (High Court, Sibu Registry) Tan Chiaw Thong J said:

> I do not think that if the Court otherwise has jurisdiction, it is debarred by the provisions of this section from exercising such jurisdiction where it considers fit and proper to do so. I do not read s. 115 of the 1967 Act as ousting any jurisdiction of the Court if the Court otherwise has jurisdiction to deal with the property mentioned in that section. 'The jurisdiction of the King's Court must not be taken to be excluded unless there is clear language in the statute which is alleged to have that effect (per Evershed MR in *Goldsack v. Shore* [1950] 1 All ER 276 at 277)'.

With the above observation, I respectfully agree.

It must be noted, however, that Criminal Revision Nos. 12 and 13 of 1973 was decided upon s. 316 of the Criminal Procedure Code (Cap. 58 in the Laws of Sarawak 1958 Volumn II) (repealed) and the material words in subs. (1) of the said section were "when any property ... is produced before" the Court whereas in our instant case, s. 407(ii) of the present Criminal Procedure Code (FMS Cap. 6) provides:

> any property ... produced before it or in its custody or the custody of the police

The scope under the said s. 407(ii) is wider in that it covers property in the custody of the police.

Soon Chee Kong v. PP [1951] 17 MLJ 86 cited for the appellant was decided on ss. 106 and 108 of the Customs Enactment 1936. The provisions are no longer the law and are different from the comparative corresponding sections of our present Customs Act. The case, therefore, is of no assistance. Under s. 106(ii) of the 1936 Enactment, the trial Magistrate, upon being

satisfied that an offence against the Enactment had been committed and that the goods were the subject matter of or were used in the commission of the offence, had a discretion whether to order forfeiture. If a forfeiture order was not made, the senior officers of customs and the comptroller had their role to play under s. 108 of the Enactment. These, it will be seen, are different from s. 127 of our present Customs Act which makes forfeiture mandatory in the above circumstance.

Furthermore, in *Soon Chee Kong v. Public Prosecu*tor, supra, the question posed was whether the Court, when refusing an order of forfeiture under s. 106 of the Enactment, could order the release of the goods, thereby precluding the operation of s. 108 thereof. No provisions equivalent or comparable, in substance, to the said 2 sections are to be found in our present Customs Act. Moreover, unlike our instant case, in *Soon Chee Kong v. PP, supra,* the appellant was convicted. In my opinion, the dictum in *Soon Chee Kong v. Public Prosecutor* that the power to order the release of goods liable to forfeiture laid only in the executive, rested on the customs law then, but are no longer, prevailing, and also on the facts of that case.

The appeal is dismissed.

It appears obvious that the order of stay of the release of the car imposed by the lower Court upon the application of the prosecution was on account of the appeal to this Court. Since the appeal is now concluded, the order of stay is hereby revoked.

Also found at [1991] 1 CLJ 606